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IN THE

Supreme Court of the United States

October Term, 1949

No. [redacted] 61

SAMUEL L. DAVIS, Individually and on Behalf of Others Similarly Situated,

Petitioner,

vs.

E. S. COOK, *et al.*, Constituting the Board of Education of the City of Atlanta.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF AND APPENDIX IN SUPPORT THEREOF.

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Petitioner,

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E. S. COOK, *et al.*, Constituting the Board of Education of the City of Atlanta.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, reversing the judgment of the District Court of the United States for the Northern District of Georgia which had entered judgment, enjoining and restraining the respondents from paying petitioner and other Negro teachers and principals in the public schools of Atlanta less salary than is paid white teachers and principals of equal qualifications and experience, and performing substantially the same duties, solely on account of race and color, in violation of the equal protection clause of the Fourteenth Amendment.

Summary Statement of the Matter Involved.

This case has a long history. Until some time in 1942, teachers and principals in the Atlanta public schools were paid pursuant to a dual salary schedule—one for Negro teachers and principals and one for white teachers and principals. These schedules admittedly discriminated against Negro teachers and principals (R. 36, 42).

On January 30, 1941, a petition, on behalf of a teachers' association representing all Negro teachers employed in the Atlanta public school system, was filed with the Atlanta Board of Education alleging discrimination in the payment of salaries, and requesting that Negro teachers and principals be paid the same salary as other teachers of equal qualifications and experience and performing substantially the same duties, without regard to race and color (R. 10). On November 26, 1941, a second petition of the same nature was filed, but respondents took no action (R. 10).

On February 17, 1942, William Reeves, a Negro teacher employed in the school system, brought suit in the United States District Court against the respondents seeking to enjoin the practice, custom and usage of paying Negro teachers and principals less salary than is paid white teachers and principals. After the filing of the Reeves' suit, respondents announced that they were abolishing the dual schedule of salaries and ordered the institution of a new single salary schedule which would be free of discrimination on account of race and color (R. 42, 43). (The Board's resolution authorizing this action is set out on page 43 of the Record.)

On July 2, 1943, the instant complaint of the present petitioner was filed in the United States District Court (R. 2-14). On July 20, 1943, a motion to dismiss was filed (R. 14-17). No allegation was there made that petitioner had

failed to exhaust any state administrative remedies. On June 29, 1944, the motion was overruled (R. 17-30). On July 8, 1944, the answer was filed (R. 30-38). Here, again, respondents did not allege as a defense to this action failure on petitioner's part to exhaust administrative remedies.

The trial on the merits did not take place until November, 1947, three years later. Additional argument was heard in July, 1948 (R. 53), and on September 28, 1948, the trial court issued findings of fact and conclusions of law (R. 40-64). It found that the wide differential between the salaries of Negro and white teachers could only be the result of the discrimination based upon race and color in violation of the Fourteenth Amendment (R. 61). It further found that the State Board of Education fixed the state's contribution to the educational fund of Atlanta (R. 42). That on the salary schedule which the State Board prescribes the minimum rate of pay for Negro teachers is less than the minimum rate of pay prescribed for white teachers (R. 42). That the funds contributed by the State Board do not fix the rate of pay of the teachers, since the Atlanta Board provides additional funds secured through local taxation which determine the salary of teachers in the system (R. 42). The trial court's findings of fact and conclusions of law are reported in 80 F. Supp. 443.

On December 16, 1948, the final judgment and decree of the court was issued in which the court enjoined and restrained the respondents from discriminating in the payment of salaries against petitioner and other Negro teachers in the public school system and gave the Atlanta Board of Education until September 1, 1949, to readjust their salary schedules in accordance with the decree (R. 64, 65).

Notice of appeal was filed on December 30, 1948 (R. 66). The appeal was argued before the United States Court of

Appeals for the Fifth Circuit on October 17, 1949 (R. 69), and that court reversed and remanded the judgment of the lower court on December 28, 1949 (R. 86). The main ground of reversal was that the petitioner had failed to exhaust administrative remedies (R. 80-85). It was, therefore, ordered that the cause be remanded to the District Court to remain there pending for a reasonable time to permit petitioner to avail himself of the administrative remedies which the court felt must be pursued before the cause was ripe for the intervention of the federal courts (R. 86). A motion to extend the time for filing the petition for rehearing was granted on January 11, 1950 (R. 88). Petition for rehearing was filed on January 27, 1950 (R. 89-94), and was denied on February 6, 1950 (R. 95). Whereupon, petitioner brings the cause here by this petition for writ of certiorari.

Statement of Facts.

This suit was begun by petitioner in the United States District Court on July 2, 1943, almost seven years ago. It is to be remembered, however, that the efforts of petitioner and the class he represents—Negro teachers and principals in the Atlanta public school system—to have the discrimination in the payment of salaries on the basis of race and color removed, date back to the filing of the petition with the Atlanta Board on January 30, 1941, over nine years ago (R. 10, par. 15). A second petition was filed on November 26, 1941, and a suit by a William Reeves was commenced in 1942 because of the failure of the respondents to remove the discrimination in the payment of salaries (R. 43, 72).

The findings of fact of the District Court, beginning at page 40 of the record and reported in 80 F. Supp. 443, are adopted and accepted by the petitioner as a correct statement of the facts of the case, and these findings were not disputed by the Court of Appeals.

Petitioner is a Negro teacher employed by the Atlanta Board of Education. He brings this action as a class suit, pursuant to Rule 23 of the Federal Rules of Civil Procedure, as the representative of all the Negro teachers and principals employed by the Atlanta Board of Education. He alleges that the Atlanta Board is paying to him, and to all other Negro teachers employed in the school system, a salary less than is being paid to white teachers and principals with equal qualifications and experience solely on the basis of race and color (R. 9, 40, 41).

The City of Atlanta, pursuant to Article VIII, Chapter 2-70, Section 2-7001 of the Constitution of the State of Georgia of 1945[1] is permitted to maintain and support an independent school system. All teachers and principals are employed by the Atlanta Board of Education on the recommendation of its Superintendent of Schools, all respondents in this action (§ 32-605, Ga. Code Ann., Acts 1937, pp. 882, 883).

Pursuant to the public policy of the state to provide equal educational advantages to all children of public school age (§ 32-601, Ga. Code Ann., Act 1937, pp. 882, 883), the state has established certain uniform minimum standards with regard to the employment and payment of teachers in public schools throughout the state. All teachers must hold state certificates (§ 32-610, Ga. Code Ann., Acts 1937, pp. 882, 885). All public schools must be operated at least seven months per year (§ 32-602, Ga. Code Ann., Act 1937, pp. 882, 883). The State Board is authorized to determine the minimum number of teachers the various school systems may employ for the minimum seven-month school year (§ 32-609, Ga. Code Ann., Acts 1937, pp. 882, 884; Acts 1947, pp. 668, 669). The

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[1] All constitutional and statutory provisions referred to here and in the supporting brief may be found in the Appendix.

State Board is required to fix a schedule of minimum salaries to be paid to various classes of teachers prescribed by them out of the public school funds of the state (§ 32-613, Ga. Code Ann., Acts 1937, pp. 882, 886). The public school fund is to be used to pay all teachers "for not less than seven months each year in accordance with the salary schedule prescribed by the Board" (§ 32-614, Ga. Code Ann., Acts 1937, pp. 882, 886). Prior to the beginning of each school term, the State Board is required to fix the minimum schedule of teachers' salaries, and the minimum number of teachers which each school system must employ for the ensuing year (§ 32-616, Ga. Code. Ann., Acts 1937, pp. 882, 883). Each school system is permitted to operate its schools more than a minimum of seven months, supplement the state's schedule of salaries and employ teachers in addition to those required in Section 32-616, Ga. Code Ann. All teachers employed during the school term must receive at least the minimum rate of pay prescribed in the state's schedule (§ 32-615, Ga. Code Ann., Acts 1937, pp. 882, 887; Acts 1946, pp. 206-216; Acts 1947, pp. 668, 670).

The State Board of Education each year establishes a minimum schedule of salaries payable in the Atlanta school system (Exhibits 12 and 30). These schedules prescribe lower minimum rates of pay for Negro teachers than those prescribed for white teachers (Exhibits 12 and 30). The state contributes to the Atlanta Board funds sufficient to pay the minimum number of teachers which the state requires it to employ at the minimum rate prescribed in the schedule of the State Board of Education (Exhibits 12 and 30). All Atlanta teachers receive considerably more than the minimum prescribed by the state's salary schedule (Exhibits 13, 12 and 30). The Atlanta Board fixes the actual salaries payable to its teachers pursuant to its own rules and regulations (Exhibits 13, 14 and R. 42). The funds

raised locally and the funds contributed by the state are commingled into one general fund, out of which the Atlanta School Board pays the salaries of teachers and principals in its public schools.

The present salary schedule and scheme, under which the Atlanta Board is now operating, was not put into effect until September, 1944, over a year after the institution of this suit (R. 47). Adoption of the present scheme resulted in an average increase for the Negro teachers over the old scale of approximately $8 per month and of slightly under $2 per month for white teachers (R. 47), and, therefore, as the Court of Appeals stated in its opinion, the differential in the minimum rate of pay of Negro and white teachers which the salary schedule of the State Board of Education prescribed was eliminated (R. 79).

The new salary scheme of the Atlanta Board of Education established four separate categories—high school principals, elementary school principals, junior and senior high school teachers and elementary school teachers (R. 45, 46). In each category there are three to four Tracks, and on each Track there are sixteen to nineteen steps (R. 45, 46). As the trial court found, initial placement on the Track is of vital importance because this determines the number of years required to attain the "maximum placement where his salary is frozen unless in exercise of official discretion based upon subjective qualifications, he is placed on another track" (R. 48). Thus, the ultimate salary of a high school principal placed upon Track I is $250 per month, while his ultimate salary if placed on Track IV is $375 per month (R. 45). Similarly, an elementary school principal who is placed on Track I, Step 12 receives a salary of $215 per month, and it will take him eight years to obtain his ultimate maximum salary of $230 (R. 45). On the other hand, a principal placed on Track IV, Step 2 receives a salary

of $207 per month. After three years he will receive more than the maximum obtainable on Track I, and his ultimate salary is $305 per month, which he can obtain in 18 years (R. 45). Therefore, if discrimination is to be avoided, it is essential that it be eliminated in the initial placement on the schedule (R. 48).

Placement on the new schedule was recommended to the Superintendent by separate committees—one for white teachers and one for Negro teachers. Each committee operated independently with a Dr. Hunter serving on both committees (R. 47). The present placement on the schedule was approved, after some changes, by the Superintendent of Schools (R. 47). Initial placement on the schedule is determined by the Atlanta Board of Education in accordance with certain objectives and certain subjective criteria which are set out in paragraph I of Exhibit 14—*Procedures for Applying the New Salary Schedules for Elementary and High School Teachers.* Advancement on the schedule is also determined by the Atlanta Board of Education based upon certain objective and subjective criteria which are set out in paragraph 2, subsection 4 of Exhibit 14. The regulations provide that any teacher dissatisfied with her placement on the schedule may appeal to the Superintendent for reconsideration (see par. 4, Exhibit 14). A Committee on Appeals, advisory to the Superintendent, is given original jurisdiction in any appeal, but its services are not available to the aggrieved teacher (par. 4, Exhibit 14 and R. 82).

Appeal to the Atlanta Board to review the action of the Superintendent is provided in paragraph 5, Exhibit 14. Such appeal must be made in writing to the Atlanta Board of Education within ten days of the action of the Superintendent (par. 5, Exhibit 14). There is no provision for a hearing before the Atlanta Board of Education, for repre-

sentation by counsel, for the presentation of evidence or witnesses (par. 5, Exhibit 14).

Petitioner was placed on the new salary scale at the same salary he had received under the old dual and admittedly discriminatory salary schedule (R. 47).

Although the findings of the trial court on the merits were not disputed by the Court of Appeals, and the cause is here solely on the question of whether petitioner's suit was premature in that he failed to exhaust certain state administrative remedies, a brief review of the findings of the trial court will be helpful to the Court, we submit, in determining whether the writ herein sought should be granted.

At the trial voluminous testimony was taken. The trial court found that while the operation of the schedule adopted by the Atlanta Board was "complicated and their provisions overlapping, and, as shown by the evidence, little understood by defendants or teachers, they * * * are not on their face discriminatory and only become so, if administered in a discriminatory manner" (R. 48). Both petitioner and respondents employed the services of qualified statisticians. Petitioner's statistician, in reaching his conclusions, took a percentage of the Negro teacher population and compared it with a percentage of the white. This is called the sampling method. Respondents objected to the bases from which the statistician for the petitioner worked. The court concluded, however, that if the methods used by the latter had materially and erroneously affected the conclusions reached, the discrepancies could easily have been pointed out with tables asserted to be correct by the respondents on an analysis of the whole population (R. 52). No such tables were presented and, therefore, the court found that the statistics of the petitioner were "reasonably correct" and presented "conclusions which, after

allowing for a considerable margin of error and for reasonable scope in the exercise of a fair discretion based upon subjective qualifications * * *, may be properly used in the consideration and determination of the issue as to whether or not discrimination because of race or color has been shown" (R. 52).

The white teacher is 4.6 percent years older than the colored teacher. Eighty-three percent of the white teachers, as compared to 76 percent of the Negro teachers, have been elected to tenure. The white teacher has 17.83 years of education, while the Negro teacher has 17.67 years. The median total teaching experience in the Atlanta School System of the white teachers was 18.5 years, and the Negro teachers 15.4 years. Total average teaching experience was 20.2 years for the whites and 16.8 years for Negroes (R. 59-60).

The trial court found that 78.1 percent of the white high school teachers received more than $189 per month basic salary, and 21.9 percent received $189 or less; whereas 1.5 percent of the Negroes received more, and 98.5 percent received less than $189 per month [2] (R. 57). That 54.2 percent of the Negro high school teachers are on Track I, 16.6 percent on Track II, 25 percent on Track III and 4.2 percent on Track IV; whereas, 4.4 percent of the white teachers are on Track I, 12.4 percent are on Track II, 14.3 percent on Track III and 68.9 percent are on Track IV. Thus, the majority of the Negro teachers are in Track I (R. 57) with an ultimate maximum salary of $165 per month (R. 46), and the majority of the white teachers are on Track IV (R. 57) with an ultimate maximum salary of $231 per month (R. 46). In terms of comparative qualifications, the record shows that 58 percent of the white teachers have Masters degrees and

[2] The findings were 99.5 percent, but this, apparently is in error and would amount to more than 100 percent.

36 percent have A.B. degrees; whereas 41 percent of the Negroes have Masters degree and 50 percent have A.B. degrees (R. 57).

The court also found that all the colored principals in the elementary schools received less than $214 per month, whereas only 17.1 percent of the white teachers received as little as $214 per month. The rest received more, up to a maximum of $314 per month. All the Negro principals are on Tracks I and II; whereas only 16.7 percent of the white elementary principals are on Track II, 25 percent on Track III, 58.3 percent on Track IV and none on Track I (R. 58). As to their comparative qualifications, the court found that 66.7 percent of the white elementary principals have Masters degrees, while 80 percent of the Negro teachers hold such degrees; 33.3 percent of the white principals have A.B. degrees, while 20 percent of the Negroes hold such degrees (R. 58).

With regard to elementary school teachers, 71.5 percent of the white teachers receive over $139 per month, but not over $214, while 28.5 percent receive less than $140 per month. 95.2 percent of the Negro teachers receive less than $140, while 4.8 percent receive between $140 and $164. 96.5 percent of the Negro elementary school teachers are on Tracks I and II, 3.5 percent on Tracks III and IV; while 25.6 percent of the white teachers are on Track II, 18.1 percent on Track III and 56.4 percent on Track IV and none on Track I (R. 58). With respect to their academic qualifications, 26 percent of the white teachers have Masters degrees. 42 percent A.B. degrees and 29 percent two years normal training. As to Negroes, 5 percent have Master degrees, 73 percent have A.B. degrees and 21 percent have two years normal training (R. 58). With respect to experience, 23 percent of the white high school teachers have had five years

experience or less, while 41 percent of the Negro high school teachers have five years or less experience. As to the white elementary teachers, 35 percent have five years or less, while 53 percent of the Negro teachers have five years or less experience (R. 59).

With regard to study increments: 87.8 percent of the white elementary principals and 75 percent of Negroes have earned increments; 36.6 percent of the white principals and 50 percent of the Negro principals have earned five increments; 42.4 percent of the white elementary teachers have increments, 20 percent of them having as many as five; while 29.3 percent of the colored elementary teachers have earned increments, 16.9 percent as many as five. Each increment entitles the teacher to a $5 per month permanent increase (R. 59).

The court concluded that making allowances for error and for the operation of subjective qualifications which determine the fitness of the teacher that discrimination had been proved, and, therefore, ordered the writ to issue.

The Opinion of the Court of Appeals.

The United States Court of Appeals for the Fifth Circuit in reversing the judgment of the trial court based its decision on the existence of a state administrative remedy which had not been pursued (R. 70, 80, *et seq.*). The court was of the opinion that petitioner should have appealed both to the Atlanta Board and to the State Board of Education (R. 83). The court further found that the appeal to the State Board existed at the time the suit was filed, and that appeal to the Atlanta Board was first created in June,

1944 (R. 83),[3] after institution of the present suit. Since relief sought related to discrimination at the time of the decree, the court concluded petitioner should have been required to have pursued the administrative remedy available at that time (R. 84). The Court, however, did not feel that petitioner's failure to exhaust administrative remedies ousted the trial court of jurisdiction warranting dismissal, of this action (R. 84), because the failure to appeal to the State Board was not raised in the respondent's motion to dismiss, and appeal to Atlanta Board of Education, pursuant to regulations now in effect, was not made available until after institution of this suit (R. 84). The cause was remanded to the district court to there remain pending for a reasonable time to permit the exhaustion of administrative remedies (R. 85). The opinion of the Court of Appeals has not as yet been officially reported.

Petition for rehearing was filed on January 27, 1950 (R. 94), and overruled on February 6, 1950 (R. 95).

Jurisdiction.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254, this being a case involving rights secured under the Fourteenth Amendment to the Constitution of the United States. In his complaint and throughout the entire proceedings petitioner has asserted that the action of respondents in paying him and other Negro teachers and principals a lower salary than is paid to white teachers and principals of equal qualifications and experience is a denial of the equal protection of the laws guaranteed by the federal constitution.

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[3] Actually the new schedule did not go into effect until September, 1944 as found by the trial court when the classification had been completed (R. 47, 37).

Question Presented.

I.

Does the state provide an administrative remedy which is required to be exhausted prior to restort to the federal courts for relief and which necessitates the setting aside of the judgment of the trial court pending petitioner's appeal to the Atlanta and State Boards of Education?

Reasons Relied Upon for Allowance of the Writ.

I.

The principle of exhaustion of administrative remedies does not require petitioner to pursue the suggested remedy of appeal to the State Board of Education for the reason that the State Board is without statutory jurisdiction or authority to grant petitioner the relief sought in this action. The relief which petitioner seeks is from the discriminatory practices of the Atlanta Board of Education which cannot be corrected by the State Board of Education in view of the autonomous structure of the Atlanta School System and the limited authority of the State Board with respect to the payment of salaries of school teachers in the Atlanta public school system. Final authority to fix the salary of petitioner and the class he represents rests not within the State Board of Education but solely with the Atlanta Board of Education (§ 32-609, Ga. Code Ann., Acts 1947, pp. 882, 884; Acts 1947, pp. 668, 669; § 32-602, Ga. Code Ann., Acts 1937, pp. 882, 883; § 32-613, Ga. Code Ann., Acts 1937, pp. 882, 886; § 36-615, Ga. Code Ann., Acts 1937, pp. 882, 887; Acts 1947, pp. 206, 216; Acts 1947, pp. 668, 670; § 32-616, Acts 1937, pp. 882, 888; § 32-910, Acts 1919, p. 324; Acts 1947,

pp. 1189, 1190; § 32-1010, Acts 1919, p. 352, Acts 1947, pp. 1189, 1191. See also *Fordham* v. *Harrell*, 197 Ga. 135, 28 S. E. 2d 463 (1943); *Downer* v. *Stevens*, 22 S. E. 2d 139 (1942); *Carter* v. *Johnson*, 186 Ga. 167, 197 S. E. 258 (1938).)

II.

The procedure provided for appeal to the Atlanta Board of Education, as set out in paragraph 5 of Exhibit 14 (*Procedure for Applying the New Salary Schedules for Elementary and High School Teachers*), at best provides a procedure for rehearing or reconsideration since the Board determines, in the first instance, the teacher's salary and his placement on the schedule. (See Exhibit 14, pars. 1, 2; § 32-605, Ga. Code Ann., Acts 1937, pp. 882, 883.) Therefore, to require petitioner to follow the remedy provided in paragraph 5 of Exhibit 14 prior to seeking judicial relief is in direct conflict with the decision of this Court in *Levers* v. *Anderson*, 326 U. S. 219.

III.

The procedure provided for appeal to the Atlanta Board, as the trial court pointed out (R. 61), does not provide for an appeal to a disinterested party, but to the very agency guilty of effectuating the wrong complained of. Petitioner, and all the Negro teachers and principals in the school system of Atlanta, complained to the Atlanta Board and it has failed to discontinue these discriminatory practices. The principle that administrative remedies must be pursued prior to resort to the courts does not require an appeal to be taken to the very body which perpetuates the wrong on which the cause of action is based. *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210.

IV.

Under Georgia law, as defined by the highest court of the state, the statutory provisions for appeal to county and state boards of education have been construed as not barring direct resort to courts to compel the proper discharge of official duty. *County Board of Education* v. *Young*, 187 Ga. 666, 1 S. E. 2d 739 (1939); *Bryant* v. *Board of Education*, 156 Ga. 688, 119 S. E. 601 (1923). Hence, the administrative remedy provided is, under Georgia law, at best a permissive and not a mandatory remedy. Therefore, the decision of the Court of Appeals requiring the exhaustion of this remedy is in direct conflict with the opinion of this court in *Moore* v. *Illinois Central Railroad Co.*, 312 U. S. 630, where the pursuit of administrative remedy was deemed to be required only where the statute made such pursuit mandatory. Where the remedy provided was a permissive one, this Court there held that it need not be pursued prior to the institution of action in the federal courts.

V.

The opinion of the Court of Appeals is in apparent conflict with the principles enunciated by the Court of Appeals for the Ninth Circuit in *Trans-Pacific Airlines* v. *Hawaiian Airlines*, 174 F. 2d 63 (C. C. A. 9th 1949). In that case the Ninth Circuit held that the exhaustion of administrative remedies was required only where the question to be determined required expert knowledge and administrative discretion. In this case the sole question presented is whether the Atlanta Board of Education discriminated against Negro teachers in the payment of salaries solely on the basis of race and color in violation of the Fourteenth Amendment. The federal courts are better equipped to determine that question than any administrative agency of the state.

VI.

The opinion of the Court of Appeals conflicts with the principles of this Court announced in *Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290; *Pacific Telephone and Telegraph Co.* v. *Kuykendall,* 265 U. S. 196; *Porter* v. *Investors Syndicate,* 286 U. S. 461; *Aircraft & Diesel Equipment Corporation* v. *Hirsch,* 331 U. S. 752, to the effect that the presence of constitutional questions coupled with a sufficient showing of the inadequacies of the prescribed administrative remedy and threat of irreparable injury flowing from the delay incident to following the prescribed procedure were sufficient to dispense with exhausting the administrative process before instituting judicial action.

VII.

The procedure provided in paragraph 5, Exhibit 14 for appeal to the Atlanta Board of Education for review of the teacher's placement on the salary schedule is not consistent with requirements of due process of law. The time limit for effecting such review is unreasonably short and is, apparently, designed to prevent rather than to permit adequate opportunity for a full and fair hearing. The procedure provides a period of only ten days for taking an appeal to the Atlanta Board of Education. Since the very nature of petitioner's grievance is based upon a practice of racial discrimination, it would be necessary for him to have access to the voluminous files and records of the Atlanta Board; to study and analyze these files and records; and to make other investigation in order to be in a position to submit adequate proof of his claim of discriminatory treatment. This was amply demonstrated by the voluminous evidence which was presented at the trial on the merits to prove discrimination in the administration of the new salary schedule. Obviously ten days is too short a time within which to make such preparation. *Munn* v. *Des Moines National Bank,* 18 F. 2d 269 (C. C. A. 8th 1927).

VIII.

The remedy provided is inadequate for the reason that the so-called right of appeal from an unjust classification of the Superintendent falls short of the requirements of due process under the Fourteenth Amendment. There is no clear right to a hearing. No provision is made in the Board's appeal procedure for the presentation of evidence by the aggrieved teacher, nor for disclosure by the Superintendent of the basis for the action taken. There is a complete absence of the other procedural safeguards required by due process. No provision is made for the rebutting of evidence or representation by counsel. In short, the prescribed administrative remedy which petitioner is told to exhaust does not afford him an opportunity to protect his constitutional right here asserted, but constitutes an opportunity for the Board to make a decision without evidence and without a "hearing" in the due process sense. *United States* v. *Morgan,* 298 U. S. 468; *Morgan* v. *United States,* 304 U. S. 1 (1938); *Ohio Bell Telephone Co.* v. *Public Utilities Comm.,* 301 U. S. 292; *Kansas City So. Ry. Co.* v. *Ogden Levee Dist.,* 15 F. 2d 637 (C. C. A. 8th 1926); *Munn* v. *Des Moines National Bank, supra; Colyer* v. *Skeffington,* 265 Fed. 17 (D. Mass. 1920).

IX.

The new scheme and schedule, now employed by the Atlanta Board of Education, is an attempt to continue the policy, custom and usage, practiced under the old dual salary schedule, of paying to Negro teachers and principals of equal qualifications and experience less salary than is paid to white teachers and principals solely on account of race and color, under a device so ingenious and complicated as to avoid the reach of the Fourteenth Amendment.

Conclusion.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit should be granted.

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Dated: May 5, 1950.

IN THE

Supreme Court of the United States

October Term, 1949

No. ....

SAMUEL L. DAVIS, Individually and on Behalf of Others Similarly Situated,
Petitioner,

vs.

E. S. COOK, *et al.*, Constituting the Board of Education of the City of Atlanta.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Opinions of the Courts Below.

The opinion of the United States Court of Appeals for the Fifth Circuit may be found at page 70 of this record and is not yet officially reported. The findings of fact and conclusions of law and judgment of the United States District Court for the Northern District of Georgia begin at page 40 of the record and is officially reported in 80 F. Supp. 443.

Jurisdiction.

Jurisdiction of this Court rests upon Title 28, United States Code, Section 1254. The United States District Court for the Northern District of Georgia entered judg-

ment for petitioner on December 16, 1948. Judgment was reversed by the United States Court of Appeals for the Fifth Circuit on December 28, 1949. Petition for rehearing was filed on February 27, 1950 (R. 89) and was overruled February 6, 1950 (R. 95).

Statement of the Case.

The pertinent facts involved in this case have been set out in the petition itself and, therefore, will not be restated at this time.

Errors Relied Upon.

The United States Court of Appeals for the Fifth Circuit erred in reversing the judgment of the United States District Court for the Northern District of Georgia, which had entered a decree enjoining and restraining respondents from discriminating in the payment of salaries against petitioner and other Negro teachers and principals in the public schools in Atlanta, Georgia, and from paying petitioner and other Negro teachers and principals in said schools less salary than is paid to white teachers and principals of equal qualifications and experience solely on account of race and color.

The Court erred in reversing the judgment of the trial court on the grounds that petitioner should have appealed to the Atlanta Board of Education prior to seeking relief in the federal courts.

The Court erred in reversing the judgment of the trial court on the grounds that petitioner should have appealed to the State Board of Education prior to seeking relief in the federal courts.

ARGUMENT.

I.

Administrative remedies need not be pursued prior to resort to federal courts unless mandatory in nature.

In *County Board of Education* v. *Young,* 187 Ga. 664, 1 S. E. 2d 739 (1939) the Supreme Court of Georgia had before it the question whether a direct proceeding against the County Board of Education could be maintained by a teacher for restoration of her former status as principal and for her back salary. Under Section 32-910 Georgia Code Annotated, county boards of education are made tribunals for hearing and determining local controversies with respect to the construction and administration of school laws, with a right of appeal to the State Board of Education. The Court held that even if the statute were to be construed as reaching the instant controversy, such construction would not preclude a direct judicial proceeding against the Board to compel a proper discharge of official duty. (To the same effect see *Bryant* v. *Board of Education,* 156 Ga. 688, 119 S. E. 601 (1923).) Counsel for petitioner has discovered no subsequent decision of the state court limiting, restricting or repudiating the views expressed in this case.

Thus, prior to seeking judicial intervention to compel a proper discharge of official duty, one is not required under Georgia law to follow statutory procedures providing for appeal to county and state boards of education. This case raises a more fundamental question concerning proper official conduct than was presented in the *Young* case, *supra.* Petitioner, therefore, is not required to pursue any appeals to the Atlanta or State Board of Education, which may be provided, before his cause becomes ripe for judicial determination.

In *Moore* v. *Illinois Central Railway Co.*, 312 U. S. 630, this Court held that use of the administrative machinery provided under the Railway Labor Act for the settlement of disputes was not a necessary prerequisite to court action. In *County Board of Education* v. *Young, supra,* statutory appeals to county and state boards of education are similarly construed. Even if the Court of Appeals is correct in concluding that an administrative machinery is available to redress the wrongs of which petitioner complains, since utilization of this machinery is not a necessary prerequisite to court action, petitioner was entitled to federal relief without being required to first avail himself of the administrative process. We submit, therefore, that the judgment of the trial court was correct and should be affirmed.

II.

The nature of petitioner's cause is such as to require dispensing with the pursuit of administrative remedies and immediate judicial determination.

Petitioner is here complaining of irreparable injury. He instituted this suit in equity seeking a declaration of his rights and a decree enjoining and restraining respondents from discriminating against him and other Negro teachers and principals solely because of race and color in the payment of salaries. The discriminatory treatment on which his cause of action rests has continued since before 1941 when a petition requesting the Atlanta Board of Education to cease its discriminatory practices was filed on behalf of the Negro teachers and principals in the Atlanta school system.

The Atlanta Board of Education cannot pay to Negro teachers and principals less salary than is paid to white teachers and principals of equal qualifications and ex-

perience without violating the guarantees of the Fourteenth Amendment. *Alston* v. *School Board*, 112 F. 2d 992 (C. C. A. 4th 1940); cert. denied, 311 U. S. 693; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

The relief, which the trial court granted, does not reach the past conduct of the Atlanta Board of Education, but relates only to future action. Further delay in the settlement of this dispute will prolong the harm which petitioner and other Negro teachers have suffered over a long period of years. Petitioner has conclusively proved that he and other Negro teachers and principals are being discriminated against in the administration of the salary scheme and schedule under which the Atlanta Board of Education is now operating. He is entitled, therefore, to judgment declaring the Board's action to be a denial of the equal protection of the laws, *Yick Wo* v. *Hopkins, supra*, and to a decree enjoining further discrimination. *Alston* v. *State Board, supra.*

Under Georgia law, as we have pointed out above, statutory provisions providing for appeal to county and state boards of education do not bar direct court action. *County Board of Education* v. *Young, supra.* In view of the autonomy given independent school systems and the limited statutory authority which the State Board of Education may exercise with respect to teachers' salaries, its authority to grant relief is extremely dubious at best. See *Downer* v. *Stevens*, 22 S. E. 2d 139 (1942); *Fordham* v. *Harrell*, 197 Ga. 135, 28 S. E. 2d 463 (1943). In fact, we believe that the statutes and cases necessitate the conclusion that the State Board of Education is without jurisdiction and authority to grant petitioner relief herein sought.

Under these circumstances, we submit, the rule which this Court applied in *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290; *Pacific Telephone & Telegraph Co.* v. *Kuy-*

kendall, 265 U. S. 196; *Porter* v. *Investors Syndicate,* 286 U. S. 461, and restated with approval in *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U. S. 752 governs this action. In those cases, this Court established the principle that the requirement that administrative remedies be exhausted prior to resort to federal courts would be dispensed with where there was present a constitutional question, a showing of the inadequacy of the prescribed administrative relief and a threat of irreparable injury flowing from the delay incident to a pursuit of the administrative procedure. In *Aircraft & Diesel Equipment Corp* v. *Hirsch, supra,* note 38, at page 773, it was pointed out that this rule had been most frequently applied with respect to state administrative action. We submit that this case presents all factors requiring application of that rule and that the judgment of Court of Appeals in requiring petitioner to utilize the administrative process before seeking the intervention of the federal court was in error and should be reversed.

III.

The State Board of Education is without statutory jurisdiction or authority to grant petitioner the relief he seeks.

The opinion of the Court of Appeals, that petitioner should have invoked the aid of the State Board of Education before being permitted to seek relief in the federal court, we submit, was based upon an erroneous view of the law of the State of Georgia. The State Board of Education has no jurisdiction or authority to order the Atlanta Board of Education to discontinue its policy, custom and usage of paying Negro teachers less salaries than it pays white teachers of equal qualifications and experience and performing substantially the same functions.

Section 32-601, Ga. Code Ann. (Acts 1937, pp. 882, 883) empowers the State Board of Education to equalize the educational opportunities of all children of school age throughout the State of Georgia.

Section 32-604, Ga. Code Ann. (Acts 1937, pp. 882, 883) establishes several county and independent school systems as local units of administration through which the State Board is to operate in equalizing educational advantages.

Section 32-608, Ga. Code Ann. (Acts 1937, pp. 882, 884) directs the State Board of Education to divide the various local units of administration into five groups on the basis of population.

Section 32-609, Ga. Code Ann. (Acts 1937, pp. 882, 884; Acts 1947, pp. 668, 669) empowers the State Board of Education to determine for each group the minimum number of teachers to be employed for the minimum school term of seven months per year required under Section 32-602, Ga. Code Ann. (Acts 1937, pp. 882, 883).

Section 32-610, Ga. Code Ann. (Acts 1937, pp. 882, 885) provides that all teachers employed in the public school system of the state shall hold a state's certificate issued by the State Board.

Section 32-611, Ga. Code Ann. (Acts 1937, pp. 882, 886) expressly states that local school units are not prohibited from providing educational advantages in addition to those prescribed or that may be prescribed by the State Board of Education or from making rules for the government of such local systems not in conflict with the rules prescribed by the State Board.

Section 32-613, Ga. Code Ann. (Acts 1937, pp. 882-886) directs the State Board of Education to annually fix a schedule of the minimum salaries to be paid to the teachers of

the various classes prescribed by them out of the public school funds of the state; and further provides that the salary schedule shall be uniform for each of the classes of teachers fixed by the State Board.

Section 32-614, Ga. Code Ann. (Acts 1937, pp. 882, 886) provides that the common school funds of the state shall be used by the State Board to pay to teachers in the public schools of the state for not less than seven months in each school year in accordance with the salary schedule prescribed by the State Board of Education.

Section 36-615, Ga. Code Ann. (Acts 1937, pp. 882, 887; Acts 1942, pp. 206-216; Acts 1947, pp. 668-670) empowers each local unit to operate its school for a period longer than the seven month school year established by statute and to supplement the state schedule of salaries and employ teachers in addition to the minimum number prescribed by the State Board of Education. It further expressly states that the rate of pay of all teachers must not be less than the minimum salaries set by the State Board of Education.

Section 32-616, Ga. Code Ann. (Acts 1937, pp. 882-888) empowers the State Board to fix at the beginning of each year the minimum schedule of teachers' salaries for the ensuing year and to determine the minimum number of teachers which may be employed for each local unit.

Pursuant to this statutory authority, the State Board of Education classifies teachers in the Atlanta School System on the basis of their types of certificates and years of training (see Exhibits 12 and 30). It determines the minimum number of teachers which the Atlanta Board of Education may employ and prescribes a minimum rate of pay and allocates state funds to the Atlanta Board on this basis. The Atlanta Board of Education has exclusive authority to employ teachers (see *Fordham* v. *Harrell, supra; Carter*

v. *Johnson, supra*), and the salaries it pays are considerably higher than the minimum rate prescribed by the State Board of Education (compare Exhibits 12 and 30, *State Salary Schedule for Teachers,* and Exhibit 13 and R. 45, 46, *Salary Schedule in Atlanta Public Schools*). Funds to provide these additional advantages are raised locally pursuant to authority granted in Section 32-1111, Ga. Code Ann. (Acts 1919, p. 340; Acts 1946, pp. 206, 211). The Atlanta Board and it alone is in sole and exclusive control of these funds. *Downer* v. *Stevens, supra.* In addition the Atlanta Board of Education provides for a teacher classification considerably different from that which the State Board prescribes. The Atlanta Board of Education determines actually and finally the salaries which each teacher is to receive.

Under the statute all that the State Board can require is that the teachers employed in the Atlanta School System do not receive a rate of pay less than the minimum which has been prescribed in the state salary schedules. Statutory authority is expressly given to the Atlanta Board of Education to pay to the teachers higher salaries, and as long as its rate of pay meets the minimum standard which the State Board of Education prescribes, that Board is without jurisdiction or statutory authority to tell the Atlanta Board of Education what salary it must pay the teachers in its employ.

Thus, it is difficult to perceive how petitioner could obtain relief from the State Board of Education since he and the other Negro teachers and principals employed in the Atlanta School System are paid more than the minimum which the state requires. It is, therefore, submitted that the State Board of Education cannot grant petitioner the relief which he seeks and, therefore, an appeal to the State Board of Education would be futile.

Further, Section 32-910 (Acts 1919, p. 324; Acts 1947, pp. 1189, 1190) and Section 32-1010 (Acts 1919, p. 352; Acts 1947, pp. 1189, 1191) which provide for appeal to the State Board of Education in general controversies determined by county boards of education and specific controversies involving the suspension of teachers would appear to negate an intent on the part of the state legislature to give the State Board of Education under Section 32-414 such overall authority over local school systems which the Court of Appeals believed it to have. The State Board's role is merely to supervise generally the public school systems of the state and to require them to meet certain uniform minimum standards. Except for this limited authority, power and responsiblity for the conduct of the schools rest with the local school systems. See *Boney* v. *County Board of Education,* 45 S. E. 2d 442 (1947); *Fordham* v. *Harrell, supra.* Thus, it is clear that the State Board cannot grant petitioner relief herein sought, and to require him to appeal to that agency is to require him to do a useless and futile act.

IV.

The procedure provided for appeal to the Atlanta Board of Education is in the nature of a petition for rehearing or reconsideration by the Board and, hence, need not be exhausted prior to resort to the federal courts.

Section 32-605, Ga. Code Ann. (Acts 1937, pp. 882-883) provides that teachers are to be elected by the Atlanta Board of Education on the recommendation of the Superintendent of Schools. The procedure outlined in Exhibit 14 for the application of the salary schedule now in effect in the Atlanta Public School System further provides that the Board of Education shall determine the salaries to be paid and the group in which the teacher shall advance in

the schedule on the recommendation of the Superintendent. (See par. 1, subsection 2, par. 2, subsection 1 of Exhibit 14—*Procedure for Applying the New Salary Schedule for Elementary and High School Teachers.*) Thus, the Atlanta Board of Education is required by statute and by its own regulations to hire the teacher, determine his salary and his placement on the salary schedule in the first instance. It is incorrect, therefore, to conclude as apparently the Court of Appeals concluded, that the determination of the teachers' salaries and his placement on the salary schedule is made by the Superintendent of Schools independent of the Atlanta Board of Education. The Superintendent of Schools merely recommends. The determination and placement is and must be made by the Atlanta Board of Education. Thus, to require petitioner to pursue the remedy provided in paragraph 5 of Exhibit 14 prior to seeking judicial relief is to require him to go to the Atlanta Board of Education and ask them to reconsider their initial action in fixing his salary and his placement on the schedule. At best this would be a procedure in the nature of a petition for rehearing. This Court in *Levers* v. *Anderson*, 326 U. S. 219 at p. 222 said the rule that "no one is entitled to judicial relief for a supposed or threatened injury * * * does not automatically require that judicial review must always be denied where rehearing is authorized but not sought." There is no statutory or constitutional requirement of the State of Georgia which makes it mandatory for petitioner to seek a rehearing before the Atlanta Board of Education prior to seeking judicial intervention. There is no constitutional or statutory authority to indicate that this was the intent of the legislature. It would therefore follow that the principle of *Levers* v. *Anderson, supra,* should apply to this case, and that petitioner would not be required to follow the procedure outlined in Exhibit 14 for seeking a review by the Atlanta Board of Education prior to seeking relief in the federal courts.

V.

The procedure provided for appeal to the Atlanta Board of Education fails to satisfy the minimum requirements of due process of law.

1.

The remedy provided under paragraph 5, Exhibit 14 for appeal to the Atlanta Board of Education is inadequate for the reason that the time limit for perfecting such an appeal is unreasonably short and is designed to prevent rather than permit adequate opportunity for a full and fair hearing.

The Atlanta Board of Education is not subject to the control of the State Board of Education with respect to fixing the total compensation payable to teachers in the Atlanta school system, except that it cannot pay less than the minimum which the State Board prescribes. Thus, the procedure outlined in paragraph 5, Exhibit 14 provides the only administrative remedy under which petitioner may conceivably obtain the relief which he now seeks. It is to be remembered that this procedure was not available to petitioner at the time this suit was filed in July, 1943, but became available one year after institution of this action.

Under the procedure described in Exhibit 14, which may be utilized when a teacher is dissatisfied with his classification and placement on the salary schedule, a Committee on Appeals, advisory to the Superintendent, is given authority to consider appeals referred to it by the Superintendent (see par. 4 of Exhibit 14). However, as the Court of Appeals correctly indicated (R. 82), since the dissatisfied teacher cannot invoke the services of this committee, it is not a part of the machinery to be considered in the application of the doctrine of exhaustion of administrative remedies.

Paragraph 5, Exhibit 14 provides that a teacher "who is dissatisfied with the action of the Superintendent on appeal may request the Board of Education to review the same. Such request shall be made in writing within ten days from the action of the Superintendent". This procedure allowing only ten days for taking an appeal to the Atlanta Board of Education is totally inadequate.

In this case, for example, petitioner alleges discriminatory conduct on the part of the Atlanta Board in paying to him and other Negro teachers and principals less salary than is paid to white teachers and principals of equal qualifications and experience. It would be necessary for him to have access to the files and records of the Atlanta Board for the purpose of study and analysis in order to compare his position and the position of other Negro teachers and principals on the scale with that of white teachers and principals of equal qualifications and experience. To sustain his claim of discriminatory treatment on appeal to the Atlanta Board of Education, it would be necessary for petitioner to follow the same method which was used to prove discrimination in the trial court, that is, the employment of a qualified statistician with access to the records of the Board for study and analysis. Only then will he be able to submit adequate proof of his claim of discriminatory treatment.

As the trial court found, the operation of the salary schedule is complicated and little understood by either the respondents or the teachers (R. 48). To obtain factual proof within the short time limit of ten days prescribed, sufficient to prove the discriminatory treatment herein alleged, would be virtually impossible. To require petitioner to pursue such a remedy is, in fact, to deprive him of a right to a full and fair hearing within the meaning of the due process clause of the Fourteenth Amendment.

The principle here enunciated is illustrated by *Munn* v. *Des Moines National Bank*, 18 F. 2d 269 (C. C. A. 8th 1927). In that case the court had before it the problem of deciding whether a suit could be entertained in equity against the application of a discriminatory state tax statute prior to the exhaustion of administrative remedies. The gravamen of the complaint asserted by the taxpayers was that the records from which they would be able to obtain proof of discrimination was not made available until a few days prior to the scheduled hearing before the administrative agency. The court entertained the suit because it concluded that the shortness of time available to the taxpayers to properly prepare for the administrative hearing made the administrative remedy totally inadequate. There the court said, at page 271, that an adequate "remedy which will prevent the maintenance in this court of equity of these suits must be 'as practical and efficient to the ends of justice and its prompt administration as the remedy in equity' ".

In view of the fact that the ten days prescribed for appeal to the Atlanta Board of Education does not afford sufficient time for petitioner to assemble evidence essential to prove the claimed discrimination, in effect, no administrative remedy is available to him. The rule requiring exhaustion of administrative remedies, therefore, does not apply to the procedures set out in Exhibit 14 prescribing the method of appeal to the Atlanta Board of Education.

2.

The many procedural shortcomings relating to petitioner's opportunity to obtain a full and fair hearing under the procedure presented in Exhibit 14, make it clear that the machinery which respondents have established fails to satisfy the minimum requirements of due process of law. The regulations promulgated by the Board of Education fail to indicate what rights a dissatisfied teacher has with

respect to the fundamental question of notice and opportunity for a hearing. All that the regulations contemplate, and all that the regulations provide is that in some manner there may be a review by the Board of Education of the action taken by the Superintendent at the request of a dissatisfied teacher. No clear right to a hearing is set forth or spelled out. Under the regulations no hearing, in fact, is required.

There is a complete absence of other procedural safeguards which this Court has said are essential to an adequate hearing before an administrative agency. No provision is made for the presentation of evidence by the aggrieved teacher, for the rebutting of evidence, nor for representation by counsel. There is no procedure prescribed whereby the teacher can be advised of the bases of the action taken by the Superintendent in placing him in one position on the scale as compared with placing another teacher of equal qualifications and experience and performing the same duty on another position on the scale. The regulations do not require that the Superintendent make a record of the bases for her findings in the first instance. In short, the regulations permit an *ex parte* determination of the salary to be made without evidence, without disclosure of the bases for making such a determination, without consultation with the teacher and without affording the teacher an opportunity to be heard. Moreover, the Board is not required to grant the aggrieved teacher a hearing, and though it is charged with the responsibility of reviewing the action of the Superintendent on an appeal by the teacher, no procedural steps governing such review are set forth in the regulations. It is clear, therefore, that this procedure fails to meet the minimum requirements of due process as understood and interpreted by this court. See *Londoner* v. *Denver*, 210 U. S. 373; *United States* v. *Morgan*, 298 U. S. 468; *Morgan* v. *United States*, 304 U. S. 1; *Ohio*

Bell Telephone Co. v. *Public Utilities Commission*, 301 U. S. 292. See also *Kansas City So. Ry. Co.* v. *Ogden Levee Dist.*, 15 F. 2d 637 (C. C. A. 8th 1926); *Colyer* v. *Skeffington*, 265 Fed. 17 (D. Mass. 1920).

There is no necessity for the administrative hearing to be governed by strict rules of courts of law, but reasonable standards of justice and fair play must be assured. In the light of the procedural shortcomings pointed out above, no such safeguards are provided under the regulations which respondents have promulgated.

In short, the administrative remedy which the Court of Appeals states that petitioner is required to exhaust does not afford him an opportunity to protect the constitutional rights here asserted, but on the contrary constitutes an opportunity for the Board to make its decision without evidence and without affording petitioner a hearing within the meaning of due process of the law. The remedy being inadequate petitioner was entitled to seek direct judicial intervention.

3.

As pointed out by the trial court, to require petitioner to appeal to the Atlanta Board of Education would be to require him to appeal not to a disinterested agency but to the very body whose actions he is now seeking to have corrected (R. 61). This Court in *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, and *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210 concluded that it was not an essential prerequisite to federal action that a complainant seek redress from the administrative agency guilty of the wrong upon which his cause of action is based. Therefore even if appeal to the Atlanta Board can be considered adequate, since petitioner would be required to appeal to the very party guilty of the wrong upon which petitioner bases his complaint, petitioner is not barred from proceeding directly in the federal courts.

Under Section 32-605, Ga. Code Ann. (Acts 1937) the Atlanta Board has full authority and responsibility for the hiring of teachers in the Atlanta School System. The Atlanta Board is responsible for determining the teacher's salary and his placement on the salary schedule. The regulations themselves set out in Exhibit 14 expressly and specifically recognize and provide for the exercise of this authority in the Atlanta Board of Education (see pars. 1 and 2, Exhibit 14). All the Superintendent may do is to recommend. Responsibility rests solely with the Atlanta Board.

As the Court of Appeals has construed, these regulations, initial placement on the schedule and determination of the teachers' salary is made by the Superintendent of Schools independent of the Atlanta Board of Education. This the Superintendent of Schools is not empowered to do under the statute. Section 32-605, Ga. Code Ann. (Acts 1937); *Fordham* v. *Harrell, supra; Carter* v. *Johnson, supra;* and if the regulations provide for such independent action on the part of the Superintendent of Schools then such regulations are invalid.

For these reasons, we submit, the Court of Appeals was in error in holding that petitioner was required to appeal to the Atlanta Board under the procedure prescribed.

VI.

The opinion of the Court of Appeals in this case is in apparent conflict with the Court of Appeals of the Ninth Circuit.

In this case the Court of Appeals for the Fifth Circuit held that the granting of federal relief was premature in view of the fact that petitioner had failed to avail himself

of the state administrative remedies. Petitioner is here seeking a declaration of his right to be free of discrimination in the payment of salaries by the Atlanta Board solely because of his race and color. He further seeks to enjoin and restrain respondents from continuing their policy, custom and usage of discriminating against him and other Negro teachers and principals. The question presented does not involve the application of administrative discretion. Nor does it require for its determination any special or expert knowledge with which the administrative agency may be peculiarly equipped. Where racial discrimination exists it is violative of the Federal Constitution. Hence, questions of administrative discretion cannot be determinative of a problem of that nature.

Racial discrimination in the payment of teachers' salaries has been proved by petitioner in the trial court. It is within the special province of the federal courts to determine whether discriminatory treatment is practiced by state officials and to grant appropriate relief from such wrongful conduct. See *United States* v. *Carolene Products Co.*, 304 U. S. 144; *Shelley* v. *Kraemer*, 334 U. S. 1. Yet the Court of Appeals construed the rule requiring the exhaustion of administrative remedies prior to resort to federal courts as being automatically applicable in this case without regard to these factors.

In *Trans-Pacific Airlines* v. *Hawaiian Airlines*, 174 F. 2d 63 (C. C. A. 9th 1949), the Court of Appeals for the Ninth Circuit held that the rule requiring exhaustion of administrative remedies is applicable only in those cases where solution of the problem requires familiarity with complicated factual situations peculiar to the field in which the administrative agency operates, or where decision rests on exercise of administrative discretion. In all other instances, it was

stated, failure to pursue administrative remedy was not a barrier to the intervention of federal courts. Had the Court below applied this rule on appeal in this case, the judgment of the trial court would have been affirmed.

It is therefore apparent that the two courts are approaching the problem from two different and conflicting points of view, and the petition for writ of certiorari herein sought should be granted to resolve this conflict.

Conclusion.

We submit that for the reasons hereinabove stated, the judgment of the trial court was correct and should have been affirmed by the Court of Appeals. There are no available administrative remedies which petitioner can utilize to obtain the relief herein sought. Respondents are still practicing the discrimination herein complained of under a complicated machinery designed to protect their illegal actions from the reach of the Fourteenth Amendment. Wherefore, it is respectfully submitted that this petition for writ of certiorari should be granted, and the judgment of the Court of Appeals should be reversed.

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Dated: May 5, 1950.

APPENDIX.

Constitution of the State of Georgia of 1945.

Article VIII.

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Section II.

Chapter 2-65. State Board of Education.

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2-6501. Paragraph I. Appointment; personal; terms of office; vacancies; eligibility; powers and duties.—There shall be a State Board of Education, composed of one member from each Congressional District in the State, who shall be appointed by the Governor, by and with the advice and consent of the Senate. The Governor shall not be a member of the State Board of Education. The first State Board of Education under this Constitution shall consist of those in office at the time this Constitution is adopted, with the terms provided by law. Thereafter, all succeeding appointments shall be for seven year terms from the expiration of the previous term. Vacancies upon said Board caused by expiration of term of office shall be similarly filled by appointment and confirmation. In case of a vacancy on said Board by death, resignation, or from any other cause other than the expiration of such member's term of office, the Board shall by secret ballot elect his successor, who shall hold office until the end of the next session of the General Assembly, or if the General Assembly be then in session to the end of that session. During such session of the General Assembly the Governor shall appoint the successor member of the Board for the unexpired term and shall submit his name to the Senate for confirmation. All members of the Board shall hold office until their successors are appointed and qualified. The members of

the State Board of Education shall be citizens of this State who shall have resided in Georgia continuously for at least five years preceding their appointment. No person employed in a professional capacity by a private or public education institution, or by the State Department of Education, shall be eligible for appointment or to serve on said Board. No person who is or has been connected with or employed by a school book publishing concern shall be eligible to membership on the Board, and if any person shall be so connected or employed after becoming a member of the Board, his place shall immediately become vacant. The said State Board of Education shall have such powers and duties as provided by law and existing at the time of the adoption of this Constitution, together with such further powers and duties as may be hereafter provided by law.

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Section III.

Chapter 2-66. State School Superintendent.

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2-6601. (6577) Paragraph I. **Election; term of office; qualifications; compensation.**—There shall be a State School Superintendent, who shall be the executive officer of the State Board of Education, elected at the same time and in the same manner and for the same term as that of the Governor. The State School Superintendent shall have such qualifications and shall be paid such compensation as may be fixed by law. No member of said Board shall be eligible for election as State School Superintendent during the time for which he shall have been appointed.

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Section VII.

Chapter 2-70. Independent School Systems.

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2-7001. Paragraph I. **Maintenance of existing systems; new systems prohibited.**—Authority is hereby granted to municipal corporations to maintain existing independent school systems, and support the same as authorized by special or general law, and such existing systems may add thereto colleges. No independent school system shall hereafter be established.

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Section VIII.

Chapter 2-71. Meetings of Boards of Education.

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2-7101. Paragraph I. **Meetings open to the public.**—All official meetings of County Boards of Education shall be open to the public.

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Section XI.

Chapter 2-74. Grants, Bequests, and Donations.

• • • • • • • • • • •

2-7401. (6581) Paragraph I. **State Board of Education and Regents of University System.**—The State Board of Education and the Regents of the University System of Georgia may accept bequests, donations and grants of land, or other property, for the use of their respective systems of education.

• • • • • • • • • • •

2-7402. Paragraph II. **County boards of education and independent school systems.**—County Boards of Education and independent school systems may accept bequests, donations and grants of land, or other property, for the use of their respective systems of education.

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Georgia Code Annotated.

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32-401. Board created; members; appointment.—The State Board of Education, hereby created, shall be composed of one member from each congressional district in this State, who shall be appointed by the Governor, by and with the advice and consent of the Senate. The Governor shall not be a member of the State Board of Education. The said State Board of Education provided for by this Chapter shall have the powers and duties now provided by law for the State Board of Education, and such as may be hereafter provided; and shall be subject to all provisions of law with respect to the State Board of Education, not inconsistent with this Chapter. (Acts 1937, p. 864; 1943, pp. 636, 638.)

32-402. Terms of office.—The first State Board of Education appointed hereunder shall hold office as follows: two for three years; four for five years; and four for seven years. All of said terms shall date from January 1, 1943. The Governor in making said appointments shall designate the holders of the respective terms. Successors to persons so appointed shall hold terms of office of seven years from the expiration of the previous term. All members of the Board appointed for a first or succeeding full term shall hold office until their successors are appointed and qualify. Any appointment of a member of the Board for a full term,

made when the Senate is not in session, shall be effective until the same is acted on by the Senate. (Acts 1937, pp. 864, 865; 1943, pp. 636, 637, 638.)

32-403. Vacancies.—In case of a vacancy on said Board, by a death or resignation, or from any other cause other than such member's term of office, the Board shall by secret ballot elect his successor, who shall hold office until the end of the next session of the General Assembly, or if the General Assembly be then in session, to the end of that session, and such election shall be effective for such interim. During such session of the General Assembly, the Governor shall appoint the successor member of the Board for the unexpired term and submit his name to the Senate for confirmation. (Acts 1937, pp. 864, 865; 1943, pp. 636, 638.)

* * * * * * * * * *

32-404. Eligibility for membership.—The members of the State Board of Education shall be citizens of this State who have resided in Georgia continuously for at least five years preceding their appointment. No person employed in a professional capacity by a private or public educational institution, or by the State Department of Education, shall be eligible for appointment or to serve on said Board. No person who is or has been connected with or employed by a schoolbook publishing concern shall be eligible to membership on the Board, and if any person shall be so connected or employed after becoming a member of the Board, his place shall immediately become vacant. (Acts 1937, pp. 864, 865.)

* * * * * * * * * *

32-405. Oath; meeting for organization; officers.—The members of the Board of Education shall take an oath of office for the faithful performance of their duties and the

oath of allegiance to the Federal and State Constitutions and enter upon the discharge of same on the effective date of this Chapter. They shall meet at the State capitol in the Department of Education, or at such place in the capitol as may be designated by the Governor for that purpose. They shall elect one of their members as chairman, and shall fix the term of office of the chairman. (Acts 1937, pp. 864, 865.)

32-406. Meetings.—The Board shall meet quarterly in regular session, at such time as they may by regulation provide, and may hold additional meetings at the call of the chairman: Provided, that upon the written request of a majority of the members of the Board the State Superintendent of Schools shall call a meeting at any time. (Acts 1937, pp. 864, 865.)

32-407. Per diem and mileage of members.—The members of the Board shall receive the sum of seven dollars for each day of actual attendance at the meetings of the Board, and as actual cost of transportation to and from the place of meeting and their respective homes by the nearest practicable route the mileage allowed by law to State officers and employees. Such per diem and mileage shall be paid by the State Department of Education. (Acts 1937, pp. 864, 866.)

32-408. Rules and regulations for supervision of schools; courses of study; curriculum revision; administration of school funds.—The State Board of Education shall provide rules and regulations for the supervision of all public schools of this State; they shall provide a course of study for all common and high schools receiving State aid and may, in their discretion, approve additional courses of study set up by the local units of administration; provide for curriculum revisions and for the classification and certifi-

cation of teachers. They shall make such rules and regulations as may be necessary for the operation of the common schools and for the administration of the common school fund. (Acts 1937, pp. 864, 866.)

32-409. Estimate of funds needed.—The Board shall prepare and submit to the Governor and General Assembly of the State of Georgia an estimate of the funds necessary for the operation of the State public school system. (Acts 1937, pp. 864, 866.)

32-410. Control of employees.—The Board shall have general supervision of the State Department of Education and shall employ and dismiss, upon the recommendation of the State Superintendent of Schools, such clerical employees, supervisors, administrators, and other employees as may be necessary for the efficient operation of the common school system. (Acts 1937, pp. 864, 866.)

* * * * * * * * * *

32-411. Set aside funds for maintenance of Department.—The Board shall set aside the necessary funds for the maintenance of the office of the State Department of Education and the State Superintendent of Schools, the amount and sufficiency of said funds to be in the discretion of the State Board of Education, said funds to be disbursed by the State Superintendent of Schools in the payment of salaries and travel expense of employees; for printing, communication, equipment, repairs and other expenses incidental to the operation of the State Department of Education. (Acts 1937, pp. 864, 866.)

32-411.1. Elementary and high school grades.—For the purpose of operation of the common schools of this State, and the participation therein by the State, the elementary grades of the common schools shall embrace grades one

through seven, inclusive, and no other; and the high school grades shall embrace eight through 12, inclusive, and no other. (Acts 1947, pp. 668, 669.)

• • • • • • • • • • •

32-412. Powers of old Board.—Except as provided by this Chapter, the State Board of Education shall also have all the powers conferred by law upon the State Board of Education created by section 32-401 of the Code, and abolished by section 32-419, and shall perform all the duties now required by law of said State Board of Education as now constituted. (Acts 1937, pp. 864, 867.)

• • • • • • • • • • •

32-414. Appeals to State Board.—The State Board of Education shall have appellate jurisdiction in all school matters which may be appealed from any county or city board of education, and its decisions in all such matters shall be final and conclusive. Appeals to the Board must be made in writing through the county superintendents of schools, or the secretary of the Official Board of Independent Systems, and must distinctly set forth the question of law, as well as the facts in the case. The Board shall provide by regulation for notice to the opposite party and for hearing on the appeal. (Acts 1937, pp. 864, 867.)

• • • • • • • • • • •

32-504. Secretary and agent of State Board of Education.—The State Superintendent of Schools shall be the executive secretary of the State Board of Education, and the administrative officer of the State Department of Education. He shall enforce and administer the regulations adopted by the State Board of Education. (Acts 1937, pp. 864, 867.)

• • • • • • • • • • •

32-601. State's policy to equalize opportunities.—It is hereby declared to be the public policy of the State of Georgia that educational opportunities for all of the children of school age in this State shall be equalized throughout the State by the State Board of Education, so far as possible. (Acts 1937, pp. 882, 883.)

32-602. Seven months' operation. Twenty days a month.—From and after July 1, 1937, the public schools of this State, including the public high schools, shall be operated, upon the basis hereinafter provided, for a period of not less than seven school months during each school year. Twenty school days shall constitute a school month. (Acts 1937, pp. 882, 883.)

32-603. School year.—The school year shall begin on the first day of July and end on the thirtieth day of June of each year. (Acts 1937, pp. 882, 883.)

32-604. Units of administration.—For the purpose of this Chapter, the several counties of the State, and the various independent school systems established by law, shall be the local units of administration. (Acts 1937, pp. 882, 883.)

32-605. Election of principals and teachers.—In the local units of administration, the several teachers and principals shall be elected by the boards of education on the recommendation of the respective superintendents: Provided, that principals and teachers in local tax districts, not operated as independent systems, shall be recommended by the board of trustees of such school district and by the county superintendent. (Acts 1937, pp. 882, 883.)

32-606. Superintendents and boards to execute Chapter.—The superintendents and the boards of education of the respective local units referred to shall execute the provisions of this Chapter under such rules and regulations as may be adopted by the State Board of Education. (Acts 1937, pp. 882, 883.)

* * * * * * * * * * *

32-608. Local units to be divided into five groups.—The State Board of Education shall divide the various local units of administration provided for by section 32-604 into five groups, on the basis of the most recent United States census, and shall regroup said locals units as early as practicable after each United States census.

(a) Group 1 shall embrace independent school systems in cities of more than 10,000 population, counties having one or more cities of more than 10,000 population, exclusive of independent systems, and counties having a population density of more than 200 per square mile.

(b) Group 2 shall embrace all independent school systems not included in Group 1 and all counties having a population density of not less than 875 and not more than 200 per square mile.

(c) Group 3 shall embrace counties having a population density of 45 or more and less than 75 per square mile.

(d) Group 4 shall embrace counties having a population density of 19 or more and less than 45 per square mile.

(e) Group 5 shall embrace counties having a population density of less than 19 per square mile. (Acts 1937, pp. 882, 884.)

32-609. Annual determination of teachers to be employed in each group.—The State Board of Education shall annually determine, subject to such variations as in its discretion may be necessary, the number of teachers to be employed for the minimum term prescribed by section 32-601, upon the basis of average daily attendance for the preceding school year, as follows:

(a) For school systems in Group 1 there shall be allowed one teacher for each 40 pupils and major fraction thereof in the elementary grades, and one teacher for each 35 pupils and major fraction thereof in the high school grades.

(b) For school systems in Group 2, there shall be allowed one teacher for each 35 pupils and major fraction thereof in the elementary grades, and one teacher for each 30 pupils and major fraction thereof in the high school grades.

(c) For school systems in Group 3, there shall be allowed one teacher for each 30 pupils and major fraction thereof in the elementary grades, and one teacher for each 25 pupils and major fraction thereof in the high school grades.

(d) For school systems in Group 4, there shall be allowed one teacher for each 25 pupils and major fraction thereof in the elementary grades, and one teacher for each 20 pupils and major fraction thereof for the high school grades.

(e) For school systems in Group 5, there shall be allowed one teacher for each 20 pupils and major fraction thereof in the elementary grades, and one teacher for each 15 pupils and major fraction thereof in the high school grades.

For the purpose of this section, grades one through seven, inclusive, and no others shall be considered elementary grades, and grades eight through 12, and no others, inclusive, shall be considered high school grades. (Acts 1937, pp. 882, 884; 1947, pp. 668, 669.)

* * * * * * * * * * *

32-610. Certifying and classifying of teachers.—The State Board of Education shall provide, by regulation, for certifying and classifying the teachers in the public schools of this State. No teacher, principal, supervisor, or superintendent, other than county school superintendents, shall be employed in the public schools unless such person shall hold a certificate from the State Board of Education, certifying to his or her qualifications as such teacher, principal, supervisor, or superintendent, or a county license issued by a county board of education pursuant to the rule and regulations of the State Board of Education. (Acts 1937, pp. 882, 885.)

32-611. Local units may provide additional advantages.—Nothing in this Chapter shall operate to prevent any local school unit from providing for local fund educational advantages in addition to those herein prescribed or that may be prescribed by the State Board of Education or from making rules for the government of such local systems not in conflict with those prescribed by the State Board. (Acts 1937, pp. 882, 886.)

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32-612. Basis of classification of teachers.—The State Board of Education shall provide, by regulation, for the classification of all of the teachers in the public schools of this State, except county school superintendents, upon the

basis of academic and professional training and experience, and the certificate or license issued to each such teacher by the State Board of Education, or pursuant to its authority, shall indicate the classification of such teacher. (Acts 1937, pp. 882, 886.)

32-613. Schedules of minimum salaries.—The State Board of Education shall annually fix a schedule of the minimum salaries which shall be paid to the teachers of the various classes prescribed by them out of the public school funds of the State, which salary schedule shall be uniform for each of the classes of teachers fixed by the State Board of Education: Provided, however, that the State Board of Education, in its discretion, may authorize or provide for variations from such schedules whenever, in its discretion, such variations may be necessary. (Acts 1937, pp. 882, 886.)

* * * * * * * * * *

32-614. Common school fund and appropriations, how used.—The common school fund and such appropriations as may have been, or may hereafter be made by the General Assembly for common school purposes, shall be used by the State Board of Education to carry out the provisions of this Chapter and for the following purposes:

(1) To pay all teachers in the public schools of the State except county superintendents, salaries for not less than seven months in each school year, in accordance with the salary schedules prescribed by the State Board of Education: Provided, that no teacher shall receive less than the minimum salary prescribed by the State Board of Education for the class to which such teacher belongs, unless the State Board of Education, in the exercise of its discretion, shall otherwise direct.

(2) To pay the salaries of county school superintendents as now provided by law.

(3) To pay to each local unit of administration, as hereinbefore defined, for the purpose of meeting local administrative expenses, the cost of operating and maintaining school plants, meeting fixed charges, the expense of auxiliary agencies, the expenses of transportation, and other administrative expenses, a sum sufficient, when added to the total amount which may be raised by such local unit of administration, by a local tax levy of five mills, to equal one-third of the amount allotted to such local unit of administration for salaries.

(4) To pay the administrative expenses of the State Department of Education, the compensation and expenses of the State Board of Education, and the State Superintendent of Schools, and such other salaries and administrative expense of the Department of Education as may be authorized by the State Board of Education and approved by the State Superintendent of Schools. (Acts 1937, pp. 882, 886.)

* * * * * * * * * *

32-615. Operation beyond seven months; supplementing salaries; additional teachers.—The board of education of any local unit of administration, as defined by this Chapter, may operate the schools of such county, or city, or school district, for a longer period than seven months during any school year, or may, in its discretion, supplement the State schedule of salaries, and employ additional teachers not provided for in this Chapter: Provided, however, that teachers in such schools shall receive not less than the minimum salary prescribed by the State Board of Education on the State schedule for any period during which the school

term may be extended, unless the State Board of Education, in its discretion, shall otherwise direct: Provided, further, that any such local unit as herein defined may operate kindergartens or grades above the twelfth solely from local funds. (Acts 1937, pp. 882, 887; 1946, pp. 206, 216; 1947, pp. 668, 670.)

* * * * * * * * * * *

32-616. Board to fix minimum salaries and number of teachers each year.—The State Board of Education shall, on or before the beginning of each school year, or as soon thereafter as may be practicable, fix the minimum schedule of teachers' salaries for the ensuing school year, and determine the minimum number of teachers which may be employed by each local unit of administration under the classification of local units prescribed by this Chapter. This information shall be furnished to the board of education of each local unit as soon as the same is available. (Acts 1937, pp. 882, 888.)

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32-622. State Board to administer; Superintendent as secretary.—The State Board of Education shall administer this Chapter, and enforce its provisions. The State Superintendent of Schools shall be the executive and administration secretary of the State Board of Education for that purpose. (Acts 1937, pp. 882, 890.)

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32-910. Powers of county boards as school court.—The county board of education shall constitute a tribunal for hearing and determining any matter of local controversy in reference to the construction or administration of the school law, with power to summon witnesses and take testimony if necessary; and when they have made a decision, such

decision shall be binding upon the parties. Either of the parties shall have the right of appeal to the State Board of Education, and such appeal shall be made through the county superintendent of schools in writing and shall distinctly set forth the question in dispute, the decision of the county board and testimony as agreed upon by the parties to the controversy, or if they fail to agree upon the testimony as reported by the county superintendent of schools: Provided, that this section shall not apply to any public school system established prior to the adoption of the Constitution of 1877. (Acts 1919, p. 324; 1947, pp. 1189, 1190.)

* * * * * * * * * *

32-1010. Examination and suspension of teachers.—The county superintendent of schools shall superintend examinations of all teachers of his county as provided by law. He shall suspend any teacher under his supervision for nonperformance of duty, incompetency, immorality or inefficiency, and for other good and sufficient causes. From his decision the teacher may appeal to the county board of education, and either the superintendent or the teacher, being dissatified with the decision of the board, may appeal to the State Board of Education, the decision of which shall be final: Provided, that this section shall not apply to any public school system established prior to the adoption of the Constitution of 1877. (Acts 1919, p. 352; 1947, pp. 1189, 1191.)

* * * * * * * * * *

32-1111. Local school systems.—Authority is given by the Constitution to municipalities now authorized by law to operate independent school systems to maintain public or common schools in their respective units by local taxation. (Acts 1919, p. 340; 1946, pp. 206, 211.)

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IN THE

Supreme Court of the United States

October Term, 1949

No. [redacted]61

SAMUEL L. DAVIS, Individually and on Behalf of Others Similarly Situated,

Petitioner,

vs.

E. S. COOK, *et al.*, Constituting the Board of Education of the City of Atlanta.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE

Supreme Court of the United States

October Term, 1949

No. 808

SAMUEL L. DAVIS, Individually and on Behalf of Others Similarly Situated,
Petitioner,

vs.

E. S. COOK, *et al.*, Constituting the Board of Education of the City of Atlanta.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This supplemental brief in support of our petition for writ of certiorari is being filed in order to bring to the Court's attention the decision of the United States Court of Appeals for the Fourth Circuit handed down on May 31, 1950, in *Carter, et al.* v. *School Board,* 182 F. 2d 531, which is in direct conflict with the decision of the court below in the instant case.

In the *Carter* case, relief was sought in the federal courts by Negro high school students residing in Arlington County, Virginia, who had applied for and had been refused certain courses and advantages being offered to all other high school students in the county. The basis of the action was that the equal protection clause of the Fourteenth Amendment had been violated in that plaintiffs were being denied educational opportunities and advantages, because of race and color, available to all other persons similarly situated.

After hearing and trial, the United States District Court found that the educational advantages and opportunities afforded plaintiffs were substantially equal to those afforded all other persons and dismissed the complaint. On appeal, the United States Court of Appeals for the Fourth Circuit found that the educational advantages and opportunities available and offered to white high school students were not available and were not offered to Negro high school students. Thereupon the cause was reversed and remanded.

One of the defenses raised was that the plaintiffs had not exhausted available administrative remedies and that, therefore, the resort to the federal courts for relief was premature. In passing upon that defense, the Court of Appeals stated at page 536:

> "Nor can it be said that a scholar who is deprived of his due must apply to the administrative authorities and not to the courts for relief. An injured person must of course show that the state has denied him advantages accorded to others in like situation, but when this is established, his right of access to the courts is absolute and complete."

In the instant case, petitioner is a Negro teacher, alleging a denial of the equal protection of the laws, in that he and other Negro teachers are being paid less salary than is being paid to white teachers performing substantially the same functions. In the *Carter* case, the plaintiffs are Negro students of public school age, alleging a denial of the equal protection of the laws in that educational advantages and opportunities available to white high school students are not available to Negro high school students, solely because of race and color. In both instances, the problem is substantially identical—whether a state may provide better and greater advantages to white persons than it affords to Negroes, in similar circumstances, solely because of race and color.

In light of the opinion in the *Carter* case, it is clear that had petitioner's cause been before the Court of Appeals for the Fourth Circuit that that court would have affirmed the judgment in his favor, and that the defense of failure to exhaust administrative remedies would not have been available to respondents.

We pointed out in our petition and main brief in support thereof that the court below in remanding the instant action on the grounds that petitioner had failed to exhaust administrative remedies was in apparent conflict with the opinion of the United States Court of Appeals for the Ninth Circuit in *Trans-Pacific Air Lines* v. *Hawaiian Air Lines*, 174 F. 2d 63. Now the decision of the court below is also in conflict with the decision of the Court of Appeals for the Fourth Circuit in *Carter, et al.* v. *School Board, supra.* The conflict between the Fifth Circuit, on one hand, and the Fourth and Ninth Circuits on the other, should be resolved by this Court.

Wherefore, it is respectfully submitted, for the reasons stated in our petition and brief in support thereof and in this supplemental brief, that the petition for writ of certiorari should be granted, and the judgment of the court below should be reversed.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. 61

SAMUEL L. DAVIS, Individually and on Behalf of Others Similarly Situated,
Petitioner,

v.

E. S. COOK et al., Constituting the Board of Education of the City of Atlanta.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. 808.

SAMUEL L. DAVIS, Individually and on Behalf of Others Similarly Situated,
Petitioner,

v.

E. S. COOK et al., Constituting the Board of Education of the City of Atlanta.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Respondents respectfully submit this brief in opposition to the grant of the writ of certiorari in the above stated cause.

They show that the writ should be denied for the following reasons:

1. The petitioner has not complied with Paragraph 1 of Rule 38 of this Court in that the petition was not accompanied by a certified transcript of the record in the case, including the proceedings in the court to which the writ is

asked to be directed. On the contrary, petitioner seeks a review in this Court by bringing forward only the pleadings, including the opinions of the District Court and the Court of Appeals, and certain exhibits, omitting all of the oral testimony and most of the documentary evidence. This evidence was before the Court of Appeals, and the conclusions of the Court of Appeals regarding the findings of the trial court were based upon this evidence, which is not before this Court.

2. The case does not fall within any of the classes of cases enumerated in subdivision 5 (b) of Rule 38.

The case is reported below as **Cook et al. v. Davis et al.**, No. 12,727, 178 F. (2) 595.

STATEMENT.

This case was tried in the District Court for the Northern District of Georgia, where certain findings of fact and conclusions of law were entered by the District Judge. Judgment for the plaintiff there was reversed by the Court of Appeals for the Fifth Circuit with direction.

The suit is one to enjoin alleged discrimination on account of race or color in the payment of salaries to school teachers in the City of Atlanta. The complaint also sought declaratory relief that such discrimination existed. A brief resumé of the facts may be helpful, since the complete record is not before the Court.

School teachers are paid in Georgia partly by State funds and partly by local funds. Atlanta is known as an independent system, that is, it has the same standing as a county school system, but is governed by a City Board of Education instead of a county board of education. The

persons who constitute the City Board of Education are the defendants here.

The Atlanta Board, as said by the Court of Appeals, "devised a nondiscriminatory scheme of individual classification and salaries with which no fault is found," which provided for the classification of all teachers on a basis of individual worth by committees established for that purpose. The Superintendent was not a member of the committee, but provision was made for appeal to the Superintendent by any teacher who was dissatisfied with the action of the committee. The committee consisted of the Assistant Superintendent and certain white and colored supervisors. There were separate committees for white high school teachers and colored high school teachers, and separate committees for the white and colored grammar school teachers.

It was provided that any teacher who was dissatisfied with the action of the Superintendent on appeal could request the Board of Education to review the Superintendent's action, the only procedure required being that the request be made in writing within ten days from the action of the Superintendent.

All of the teachers were classified for the school year beginning September, 1944. Each teacher was notified of his classification and of what his basic salary would be.[1]

There were no formal appeals from the placement committees to the Superintendent. There were some informal appeals, all of which were handled satisfactorily to the complaining teacher, about equally divided between white and colored teachers. There were no appeals, formal or informal, from the Superintendent to the City Board, and no appeals of any sort to the State Board of Education,

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1 There was a supplement, called a bonus, of the basic salary, uniform in percentage as to all teachers.

which has general appellate jurisdiction under the laws of the State.

The points presented to the Court of Appeals were:

(1) Should the motion to dismiss have been sustained?

(2) Are the findings of fact and conclusions of law of the trial judge authorized by the record and the evidence?

The Court of Appeals for the Fifth Circuit reversed the trial judge and directed "that the cause be remanded to the District Court and remain pending for a reasonable time to permit exhaustion of administrative remedies; and thereafter such further proceedings may be had as shall then appear to be proper."

BRIEF AND ARGUMENT.

1.

The Petition Fails to Comply With the Rules.

As we understand Paragraph 1 of Rule 38, it requires that a petition for certiorari be accompanied by certified transcript of the entire record in the case, including the proceedings in the court to which the writ is asked to be directed. Petitioner here has filed as the record the **printed** portion of the record in the Court of Appeals for the Fifth Circuit, which is numbered pages 1 through 68 of the printed record here. To this he has added printed pages numbered 69 to 95, both inclusive, appearing in the printed record here, which contain certain extracts from the minutes of the Court of Appeals showing argument and submission to that Court, the opinion and judgment of the Court of Appeals, and the petition for rehearing, with the order denying it.

In addition to this printed record in the Court of Appeals, petitioner has had transmitted as original documents from the District Court Plaintiff's Exhibits Nos. 11, 12, 13, 14 and 30, introduced in evidence in that Court.

It will be noted from page 68 of the printed record here, which page contains a certificate of the Clerk of the District Court to the Court of Appeals, that the pages certified by him as correct contain a correct copy of the original record "except original physical exhibits and reporter's transcript of evidence."

There was filed in the Court of Appeals a motion by attorneys for appellants (respondents here) that the original documentary evidence and the reporter's transcript of the parol testimony be transmitted to the Court of Appeals. This petition or motion was consented to by attor-

neys for appellee (petitioner here), who joined in the request. There was an order by the Senior Judge of the Court of Appeals for the Fifth Circuit granting the motion as prayed for. For the Court's information, we attach to this brief as an exhibit a certified copy of this proceeding, which is also omitted from the record filed here.

Apparently the documentary evidence and the reporter's transcript of the parol testimony were returned to the District Court with the mandate of the Court of Appeals, for counsel for petitioner on April 6, 1950, procured an order from the District Judge authorizing the Clerk to certify and transmit to the Supreme Court of the United States such portions of the original exhibits and records as might be requested by counsel.

Paragraphs 7 and 8 of Rule 38 of this Court relate to the printing of the record, and paragraph 8 contemplates that counsel by agreement dispense with printing any unnecessary part of the record where it has to be printed for this Court. No such agreement has been made. But this has nothing to do with paragraph 1, which requires that the entire record be transmitted.

Petitioner here seems simply to have failed to comply with the rules, and that we think is and should be ground for denying the writ.

Apparently petitioner seeks to excuse the absence of the evidence by the statement in the petition (page 4), "The findings of fact of the District Court, beginning at page 40 of the record and reported in 80 F. Supp. 443, are adopted and accepted by the petitioner as a correct statement of the facts of the case and these findings were not disputed by the Court of Appeals."

We do not think this adoption of the facts as stated by the District Judge can justify a failure to comply with the

rules of this Court. But we cannot agree with petitioner that the Court of Appeals did not dispute the findings of the District Judge. To the contrary, the Court of Appeals, 178 F. (2) 599, made a detailed examination of the parol testimony and was dissatisfied with the weight given to it by the District Court. The Court of Appeals said:

> "The Superintendent and the defendants who testified say they are making a sincere, diligent and successful effort to classify all their teachers according to their individual worth as teachers. No teacher but Davis (the plaintiff) testified, and **he makes a very unimpressive case for himself.**" (Emphasis supplied.)

The Court further said:

> "The decree is very vague; it could not be of much practical help to the Board. Nor could it be easily enforced, for it only states in general terms a duty which no one disputes, with no specifics at all pointed out."

The Court of Appeals also did not agree with the conclusions of the District Judge concerning the remedy by appeal. The Court of Appeals said:

> "The appeal to the Atlanta Board from the decisions of the Atlanta Superintendent and her aides as to individual placements and salaries is not to the same persons who did the wrong. The Board, after the ten days allowed for appeal, makes annual contracts with the teachers recommended by the Superintendent at the salaries recommended, but if the Superintendent erred in making the recommendations, the members of the Board had no part in it, and may properly act to correct it. The State Board is even further removed from the error of the Atlanta Superintendent."

It is impossible for this Court to determine whether the conclusions of the Court of Appeals upon the facts are proper without the evidence before it.

Without the evidence before it, the Court cannot determine whether the Court below was right in concluding that the plaintiff had never appealed from his classification and placement on the salary scale.

The court below said:

> "The new Superintendent, Miss Jarrell, testified that Davis made no complaint; and since this suit was pending she asked him if he was still dissatisfied, and he said he 'thought we were doing the best we could'; and she asked him to come and talk about his salary, but he never did. A few other teachers complained to her, and each complaint was satisfactorily adjusted. No one has ever appealed to the Atlanta Board or the State Board. Neither Davis nor any other witness denies this."[2]

In his brief petitioner claims, "Petitioner has conclusively proved that he and other Negro teachers and principals are being discriminated against in the administration of the salary scale and schedule under which the Atlanta Board of Education is operating."

We deny the correctness of this bold statement, but its correctness depends upon the evidence, which is not here. This Court should not undertake to review a conclusion of the Court of Appeals that the only testimony in the record

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2 Actually the testimony of Miss Jarrell is a little stronger than that. Concerning Davis she testified:

> "He came into my office and talked to me at one time about another matter, and I asked him why he didn't come in and talk about his salary if he was dissatisfied, and he said at that time he thought we were trying to do the best job we possibly could, and he was moving (advancing in salary) and he was satisfied."

We take the quotation from the appendix to the brief filed in the Court of Appeals.

was that of Davis, and that he made a very unimpressive case for himself without the evidence before it.

As a matter of fact, the District Court and the Court of Appeals both say that the salary schedule adopted by the Atlanta Board is not discriminatory on its face. Whether or not it discriminates against any teacher on account of race or color or for any other reason is a matter of fact and of proof. An administrative remedy was provided for detecting discrimination, if any existed, and for detecting any injustice done any teacher for any reason. But the plaintiff did not avail himself of his administrative remedy, nor did he testify to discrimination against himself on account of race or color or for any other reason. No other teacher testified and the whole claim of discrimination is based entirely on figures.

2.

The Case Is Not a Proper One for Issuance of the Writ of Certiorari.

Respondents see in this case no such unusual situation as to justify review by this Court. Had there been a ruling below adverse to petitioner upon the legal merits of the right of a Negro school teacher not to be discriminated against on account of race or color in the matter of payment of salary, the case might have been proper for adjudication here.

Nobody has disputed this legal right of the plaintiff, and the court below did not decide that against him.

If the court below had said, as respondents insisted it should say, that under the ruling by this Court in **Larson v. Domestic & Foreign Commerce Corporation,** 337 U. S. 682, and cases there cited, the suit was in purpose and effect one against the State of Georgia, there might have

existed good ground for reviewing that conclusion by writ of certiorari. But the Court did not so hold. It ruled in petitioner's favor on that question.

The court considered, and consideration was proper, the evidence below both on the question of whether or not the plaintiff had followed his administrative remedy and whether he had shown discrimination against himself. The court believed that inasmuch as under the evidence the classification and salary of each teacher was reviewed every year, any dissatisfaction should be tested by an appeal. It said:

> "As each year's classifications and salaries are fixed, the appeals there provided ought to be used. But failure to use that provided since the filing of the suit ought not justly to cause dismissal of the suit now . . . But . . . we think the decree ought to have been withheld till the remedies then available shall be exercised, because a pursuit of them may cause an adjustment of the controversy and will certainly bring to a focus the particular wrongs so as to enable the court to frame a specific and useful decree . . . Therefore, upholding the court's jurisdiction, we set aside the findings and the decree as improvidently granted and direct that the cause be remanded to the District Court and remain pending for a reasonable time to permit exhaustion of administrative remedies; and thereafter such further proceedings may be had as shall then appear to be proper."

Thus it appears that the questions decided below were governed by the peculiar facts of the particular case.

We think clearly, therefore, the case does not come within the general rule concerning the granting of writs of certiorari.

Petitioner in his brief assigns a number of reasons why certiorari should be granted.

None of them is, we think, sufficient.

First, it is said that the State Board of Education is without jurisdiction to grant petitioner the relief he seeks. This contention is not tenable nor is it borne out by the authorities cited in the brief to support it.

The appellate jurisdiction of the State Board of Education embraces "all school matters which may be appealed from any county or city board of education." The decisions of the State Board of Education upon any such appeal "shall be final and conclusive." The Georgia statute so provides.

If the plaintiff was discriminated against in the fixing of his salary (and he did not so testify), he had a right to appeal from the committee that placed him to the Superintendent. He had a right to appeal from the Superintendent to the City Board of Education, and from the City Board of Education to the State Board of Education. He had a right to appeal if he was being inadequately paid, whether or not he was discriminated against on account of race or color or for any other reason. The remedy was entirely adequate. The decisions of the Georgia Supreme Court cited on the question simply do not hold anything to the contrary of what is here asserted.

Petitioner in general terms alleges that the provisions for appeal are inadequate. The comprehensive analysis of the procedure made by the Circuit Court of Appeals indicates that this complaint is without substance. The right of petitioner to assail the remedy for inadequacy is very doubtful in view of the fact that he did not appeal at all. This principle is firmly established in this Court. See **Lehon v. City of Atlanta**, 242 U. S. 53, at 56, 61 L. ed. 145, at 150, where this Court said:

> "To complain of a ruling, one must be made the victim of it. One cannot invoke, to defeat a law, an apprehension of what might be done under it, and which, if done, might not receive judicial approval."

The contention that the City Board of Education determines the salary and the placement of the teacher under the schedule in the first instance is simply not borne out by the record. The resolution of the Board provided for placement by the committees created by the resolution, and not for the placement by the Board itself. Nor is there any basis for the suggestion that the remedy by appeal is judicial. It is purely administrative and possesses none of the characteristics of a judicial remedy.

The contention that the appeal to the Atlanta Board was not to a disinterested party made by the statement of questions presented is also not borne out.[3]

The cases cited in this division of the brief, **Steele v. L. & N. R. Co.**, 323 U. S. 192, and **Tunstall v. Brotherhood of Locomotive Firemen and Enginemen**, 323 U. S. 210, do not support the contention. In those cases the Court said there was no administrative remedy.

The contention that under Georgia law and the decisions of Georgia courts, the administrative remedy provided is permissive and not mandatory, simply overlooks a rule stated by the Court of Appeals in this case:

> "Exhaustion of state remedies is a rule of self restraint formulated by the federal courts and is not influenced by state practice."

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3 Counsel who prepared the petition evidently did not participate in the case below, and have not considered the entire record, as they do not seem to be familiar with the testimony of retired teachers concerning conferences with members of the City Board, or with the undisputed testimony that petitioner not only made no effort to pursue his administrative remedy, but told Miss Jarrell, the Superintendent, he was satisfied.

There Is No Conflict Between Decisions of Courts of Appeal.

One of the grounds on which petitioner largely relies is an alleged conflict between the decision in this case and the decision of the Ninth Circuit in **Transpacific Air Lines v. Hawaiian Air Lines,** 174 F. (2) 63. Not only is there no conflict, but an examination of the Transpacific case discloses that the courts are in harmony. There, as here, the case was reversed with instructions to the District Court to retain it a sufficient length of time to permit the complainant to assert his administrative remedies. The discussion in the Transpacific case on which petitioner relies is clearly obiter. In the case at bar, the Court below followed the decision of this Court in **Myers v. Bethlehem Ship Building Company,** 303 U. S. 41, and **Natural Gas Pipe Line v. Slattery,** 302 U. S. 300, and its own decision to the same effect in **Bradley Lumber Co. v. National Labor Relations Board,** 84 F. (2) 97.

The opinion of the Court of Appeals does not conflict with the principles stated in Division 6 of petitioner's brief. The facts of the present case simply do not bring it within the rule there stated. This again makes manifest the inability of the Court to pass upon these questions without the evidence before it.

In paragraph 7 of their statement of points, petitioner overlooks the record again. The rule adopted by the Atlanta Board of Education does not, as stated, provide "a period of only ten days for taking an appeal to the Atlanta Board of Education."

The rule simply says "such request shall be made in writing within ten days from the action of the Superintendent." It does not require consideration and completion

of the appeal within ten days, nor does § 32-414 of the Code place a time limit upon appeals from the City Board to the State Board. The only requirement is that the appeal must be in writing and distinctly set forth the question of law as well as the facts in the case.

The contention of subparagraph 8 is simply not borne out by the record. The provision of the rule that "the Board shall consider such request and review the action of the Superintendent," as well as the requirement of the statute that the State Board "shall provide by regulation for notice to the opposite party and for hearing on the appeal," certainly do not contemplate failure of notice or denial of hearing.

This Court seems to us to have uniformly ruled that in a case such as the present one, where an administrative remedy is provided by state law or state rule, it must be exhausted before there can be resort to a federal court of equity, and this is so, as the Court of Appeals for the Fifth Circuit pointed out, because pursuit of the administrative remedy "may cause an adjustment of the controversy," and as the Court further pointed out, because it will certainly bring to a focus the particular wrong so as to enable the Court to frame a more specific and usable decree.

In the present case, the District Court in general language ordered that the defendants be enjoined against discrimination on account of race or color, a decree which it would be virtually impossible to obey, as this Court could readily determine if it had the record before it. This case is one in which the application of the principle that the administrative remedy must be first exhausted is peculiarly apt. Certainly in saying, as it did, that the case should be returned to the District Court for further proceedings, in order that the plaintiff might have an opportunity to exhaust his administrative remedy, the Court of

Appeals decided no new or novel question of law, such as to require review by this Court by the writ of certiorari.

Respectfully submitted,

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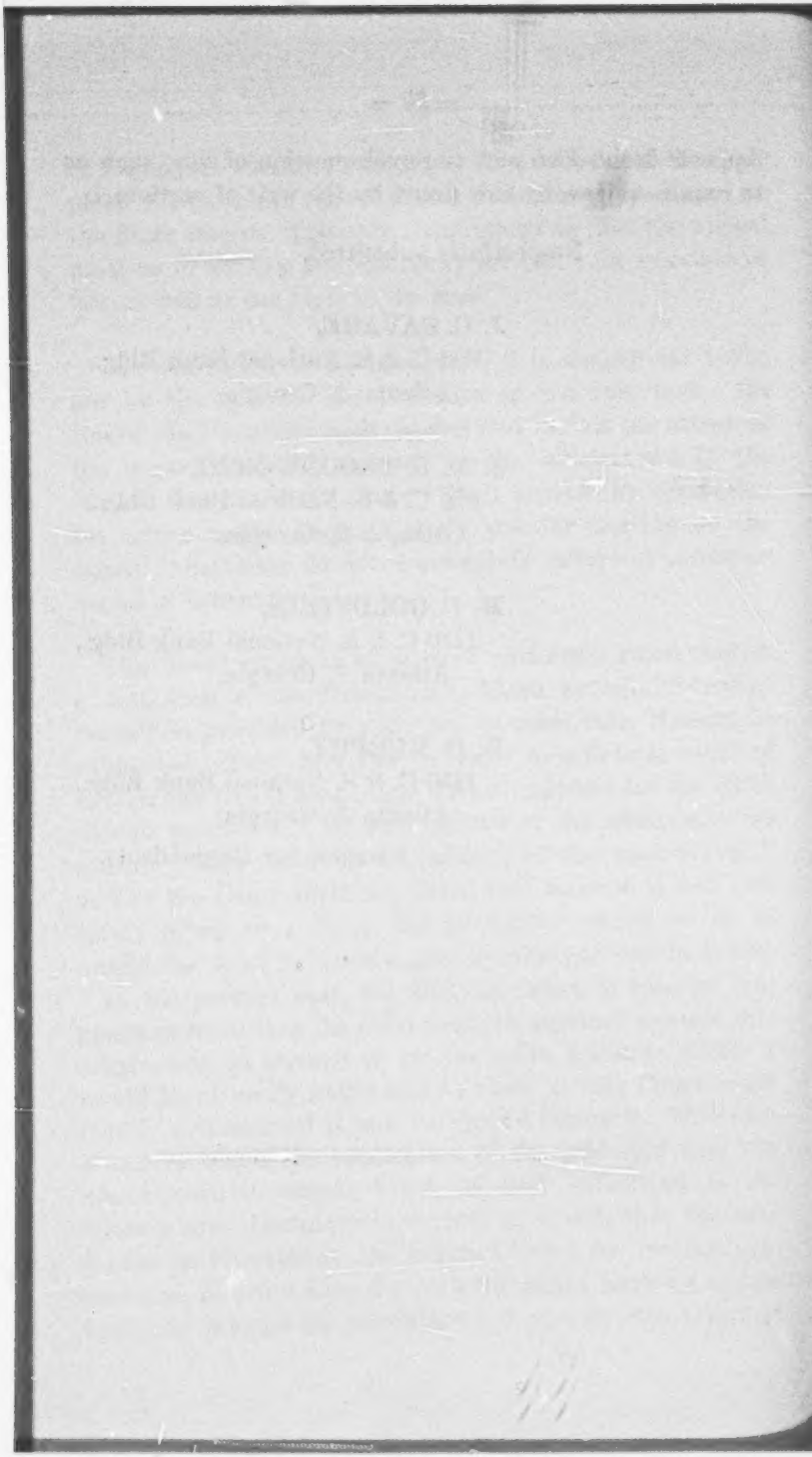

APPENDIX.

In the
UNITED STATES COURT OF APPEALS
For the Fifth Circuit.

E. S. Cook, Devereaux McClatchey, Jr., Charles C. Rife, J. H. Landers, D. M. Therrell and J. Austin Dilbeck, Constituting the Board of Education of the City of Atlanta,
Appellants,
versus
Samuel L. Davis, Individually and on Behalf of Others Similarly Situated,
Appellee.
} No. 12,727.

Appeal From the United States District Court for the Northern District of Georgia, Atlanta Division.

To the Honorable Judges of Said Court:

The petition of E. S. Cook et al. would show:

1. That they are the appellants in this court in the case of E. S. Cook et al., constituting the Board of Education of the City of Atlanta, Appellants, versus Samuel L. Davis, Individually and on Behalf of Others Similarly Situated, Appellee, being an appeal from a judgment of the Honorable E. Marvin Underwood, sitting without a jury, rendered on the 16th day of December, 1948.

2. That a timely notice of appeal was given, and said notice of appeal has been filed and docketed in this court.

3. These petitioners would show that they have been sued and they now appeal in their official capacity as members of the Board of Education of the City of Atlanta, and not personally. The funds within their control are public funds appropriated for educational purposes, the budget for which was prepared before the entry of the judgment in this case. Appellants in their official capacity have no other funds with which the cost of printing the record in this case can be paid. The Appellee and others in whose behalf he has brought this action are teachers in public schools, all of them being of limited means, and a great hardship would fall on them if eventually they were obliged to pay the cost of printing the record in this case.

4. The parties have therefore agreed and respectfully request that this court permit the evidence in the case to be transmitted to this court as original exhibits, thereby relieving them of the cost of printing the same. As additional grounds therefore, the petitioners and Appellants set forth below additional reasons for such action.

5. In addition to the oral evidence which has been transcribed by the official reporter, and two copies of which are available for filing in this court, the evidence consists of an analysis of the pay schedules and conclusions drawn therefrom, which were prepared for the Appellants by Jarvis Barnes, and for the Appellee by J. B. Blayton & Company. Each of these reports is very voluminous, and containing as they do a great many calculations and examples, would be extremely expensive to print.

6. In addition thereto the Appellants and Appellee have submitted schedules showing promotions that have been made and the conclusions drawn therefrom. It would be very difficult and expensive to print these exhibits.

7. The questions involved in this case can fairly be set forth in the briefs of the parties, together with the printing

as a supplement to the briefs of the matter in the record specifically relied upon by either party.

8. The Appellants have consulted the Appellee prior to filing this motion, and Appellee has no objection to the granting of this order.

Wherefore, the Appellants pray:

(a) That this court consider this petition for the transmission of the testimony and the exhibits to this court as original exhibits;

(b) That pending the determination of this motion, if this motion be not disposed of promptly, the time for the filing of the record be extended beyond March 8th, 1949, the time when the same expires under the order of the District Judge.

/s/ B. D. Murphy,
B. D. Murphy,
/s/ J. C. Savage,
J. C. Savage,
/s/ J. M. B. Bloodworth,
J. M. B. Bloodworth,
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The undersigned, as attorneys for Appellee, have carefully examined the foregoing petition and consent to the transmission of all the exhibits filed by both parties as original exhibits. Appellee also joins in the request that this court permit the reporter's transcript of the oral testimony to be sent to this court in lieu of the printed record.

/s/ A. T. Walden,
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/s/ Oliver W. Hill,
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In the
UNITED STATES COURT OF APPEALS
For the Fifth Circuit.

No. 12,727.

E. S. Cook, Devereau McClatchey, Jr., Charles G. Rife, J. H. Landers, D. M. Therrell and J. Austin Dilbeck, Constituting the Board of Education of the City of Atlanta,

Appellants,

versus

Samuel L. David, Individually and on Behalf of Others Similarly Situated,

Appellee.

Appeal from the District Court of the United States for the Northern District of Georgia.

Order:

Pursuant to the motion of appellants for permission to bring up to this Court the transcript of evidence and all of the Exhibits as original Exhibits, and to dispense with the printing thereof, which motion is consented to by the attorneys for appellees,

It Is Ordered that said motion be, and the same is hereby, granted.

/s/ J. C. Hutcheson, Jr.,
U. S. Circuit Judge.